Office-Supreme Court, U.S.
FILED
JAN 19 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-312

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

—v.—

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. IN SUPPORT OF RESPONDENTS

DARA KLASSEL*
EVE W. PAUL
ROGER K. EVANS
Planned Parenthood Federation
of America, Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

Attorneys for Amicus Curiae

*Counsel of Record

TABLE OF CONTENTS

PAGE

Table of Authorities iii

Interest of Amicus 1

Summary of Argument 4

ARGUMENT

I. EXECUTIVE ORDER 12,404 IS AN ATTEMPT TO SUPPRESS IDEAS WITH WHICH THE PETITIONER DISAGREES 5

II. THERE IS NO REASONABLE BASIS FOR DISTINGUISHING BETWEEN "TRADITIONAL HEALTH AND WELFARE CHARITIES" AND GROUPS ENGAGED IN LEGAL ADVOCACY 13

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: PAGE

Bellotti v. Baird, 443 U.S. 662 (1979) 15, 16

Bolger v. Youngs Drug Products, 103 S. Ct. 2875 (1983) 15

Carey v. Population Services International, 431 U.S. 678 (1977) 15

City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481 (1983).....15, 16

Colautti v. Franklin, 439 U.S. 379 (1979)..... 15

Doe v. Bolton, 410 U.S. 179 (1973)..... 15

Griswold v. Connecticut, 381 U.S. 479 (1965) 15, 16

H____ L____ v. Matheson, 450 U.S. 398 (1981)..... 15

Harris v. McRae, 448 U.S. 297 (1980) 15

Maher v. Roe, 432 U.S. 464 (1977)..... 15

NAACP v. Button, 371 U.S. 415 (1963)..... 16

NAACP Legal Defense and Educational Fund v. Devine, 727 F. 2d 1247 (D.C. Cir. 1984) 5, 12, 13, 14

People v. Sanger, 222 N.Y. 192, 118 N.E. 637 (1918) ...14, 16

Perry Education Association v. Perry Educators' Association, 460 U.S. 37 (1983) 5, 12

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 15, 16

Planned Parenthood Federation of America v. Devine, No. 82-2162 (D.D.C. 1983)..... 8, 9

Planned Parenthood Federation of America et al. v. Devine, No. 83-2118 (D.D.C. 1983) 9, 10, 11, 12

Planned Parenthood Federation of America v. Heckler, 712 F. 2d 650 (D.C. Cir. 1983) 16

PAGE

Planned Parenthood of Kansas City, Mo. v. Ashcroft, 103 S.Ct. 2517 (1983) 15

Roe v. Wade, 410 U.S. 113 (1973) 15, 16

Secretary of State of Md. v. Munson, 81 L. Ed. 2d 786 (1984) 17

Sermchieff v. Gonzales, 660 S.W.2d 683 (Mo. Sup. Ct. 1983) 16

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 17

Williams v. Zbaraz, 448 U.S. 358 (1980) 15

Constitution, Statutes, Regulations and Executive Orders:

U.S. Constitution:

First Amendment .....*passim*

26 U.S.C. § 501(c)(3), 26 U.S.C. § 4911 17

5 Code of Federal Regulations, Part 950, 48 Fed. Register 29458 (June 24, 1983) 15, 17

Executive Order 12,353 7

Executive Order 12,404 .....*passim*

Miscellaneous:

Congressional Statement of Donald J. Devine, Director of U.S. Office of Personnel Management before the Subcommittee on Manpower and Housing of the Committee on Governmental Operations of the U.S. House of Representatives, Reform of the Combined Federal Campaign, (July 19, 1983) 3, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-312

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

—v.—

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. IN SUPPORT OF RESPONDENTS

Interest of Amicus*

Planned Parenthood Federation of America, Inc. (Planned Parenthood) is a not-for-profit corporation organized in 1922 and existing under the laws of New York State. It is the largest private organization in the United States in the field of family planning. Planned Parenthood has participated in the Combined Federal Campaign (CFC) as a national voluntary organization since 1968 and received $550,373 in designated employee contributions in the Fall 1983 campaign.

* All parties have given their consent to the filing of this brief in letters filed with the Clerk of this Court.

Planned Parenthood is a national-level organization; it has 187 affiliates in 44 states and the District of Columbia, all separately incorporated and locally controlled not-for-profit entities. The affiliates operate 735 local clinics which provide family planning services in the form of medical, educational and counseling services to individuals and families. Planned Parenthood provides leadership and support to its affiliates in the form of medical standards and guidelines, guidance in affiliate management and educational, legal, public affairs, public relations, and educational services. A number of affiliates participate separately in local CFC's, either individually or as members of the United Way in their areas.

Planned Parenthood also provides substantial assistance to overseas family planning programs through its international division, Family Planning International Assistance and its participation in the International Planned Parenthood Federation. Its international programs are the principal beneficiaries of its CFC contributions.

In addition to the provision of medical and educational services to families and individuals nationally and overseas, Planned Parenthood and its affiliates have found it necessary to devote substantial resources to conducting and supporting litigation aimed at preserving and defending the legal rights of their clients to obtain these services.

Planned Parenthood's position in the CFC is, therefore, directly threatened by Executive Order 12,404 which bars from participation in the CFC organizations which seek to influence the determination of public policy through litigation. Because it pursues both traditional health and welfare services and legal advocacy to defend those services, Planned Parenthood believes that it is in a unique position to illustrate to the Court the unreasonableness and artificiality of the Executive Order's distinction between "direct" health and welfare charities and legal advocacy groups.

Planned Parenthood also believes it can contribute significantly to this litigation by bringing before the Court the history

of its protracted struggle with Petitioner over the past four years for continued participation in the CFC. Planned Parenthood believes that this history will illustrate to the Court that the disputed Executive Order is not a reasonable regulation, evenhandedly applied, but an attempt by Petitioner to suppress speakers and ideas with which he disagrees.

In addition to its assistance to the Court in resolution of the issues in this case, Planned Parenthood has an immediate interest in the outcome of this litigation. Although not a party to this case, Planned Parenthood has an identical companion case pending in the District Court for the District of Columbia. The suit was filed soon after the district court's July 15, 1983 order in the present case in favor of Respondents' admission to the CFC.

Within days of the July 15 order, Petitioner stated to a Congressional committee his intention to view the court's order as applicable only to the seven named plaintiffs (Respondents here) and to continue to apply the Executive Order's exclusionary criteria to all other organizations seeking admission to the CFC. Statement of Donald J. Devine, Director of U.S. Office of Personnel Management before the Subcommittee on Manpower and Housing of the Committee on Governmental Operations of the U.S. House of Representatives, Reform of the Combined Federal Campaign, 7 (July 19, 1983) (hereinafter "Congressional Statement").

Believing on the basis of its prior experience with Petitioner (outlined below) that it would be one of the targets of that policy, Planned Parenthood, along with the Native American Rights Fund (NARF), brought suit against Petitioner, seeking a temporary restraining order and a preliminary injunction against its exclusion from the campaign on the basis of the criteria just held unconstitutional. *Planned Parenthood Federation of America, Inc., et al. v. Devine*, No. 83-2118 (D.D.C. July 22, 1983). On July 26, 1983 the parties entered into a stipulation, approved by the district court, in which Planned Parenthood and NARF agreed to withdraw their

motion for a preliminary injunction and Petitioner agreed not to exclude the two organizations from the CFC on the basis of the disputed portions of the Executive Order. The parties further agreed that the final disposition on appeal of the legal defense fund case would apply to Planned Parenthood and NARF. (Stipulation and Order attached hereto as Appendix B.) The resolution of this case will, therefore, have an immediate impact on Planned Parenthood's pending litigation and its status in the CFC.

Summary of Argument

Part one sets out the history of Planned Parenthood's protracted struggle with Petitioner for continued participation in the CFC. Planned Parenthood submits that this history demonstrates that Executive Order 12,404 is an effort to suppress a speaker and a point of view which Petitioner opposes in violation of this Court's decision in *Perry Education Association v. Perry Educators' Association*, 460 U.S. 37 (1983). At the least, the history set out here should lead this Court, as it did the court of appeals, to view with suspicion Petioner's other, purportedly neutral and "reasonable," explanations for the Executive Order.

Part two argues that there is no reasonable basis for the Executive Order's distinction between "traditional health and welfare charities" and groups engaged in legal advocacy. Planned Parenthood, a participant in the CFC since 1968, is a "traditional" charity in the sense that it delivers and supports direct medical and educational services to individuals and families; yet, the organization has found it necessary throughout its history to engage in a substantial amount of litigation to defend the legal right of the people it serves to receive reproductive health care. By eliminating from the CFC charities which engage in legal advocacy, the Executive Order will penalize even the most "traditional" groups for whom litigation is an essential element of the delivery of health and welfare services.

ARGUMENT

I. EXECUTIVE ORDER 12,404 IS AN ATTEMPT TO SUPPRESS IDEAS WITH WHICH THE PETITIONER DISAGREES.

This Court, in *Perry Education Association v. Perry Educators' Association*, 460 U.S. 37 (1983), set out the minimum test for the constitutionality of government attempts to limit access to public property by those wishing to engage in expressive activity.

> . . . the state may reserve the forum for its intended purposes communicative or otherwise as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

460 U.S. at 46. Because the court of appeals found Executive Order 12,404 an unreasonable regulation of speech, it found it unnecessary to reach the question of whether it was also an attempt to limit expression because of official bias against the speakers' views. *NAACP Legal Defense and Educational Fund v. Devine*, 727 F.2d 1247, 1259 n.12 (D.C. Cir. 1984) Petitioner, nevertheless, asserts that

> [i]t is clear that the limitation of Campaign participation to traditional health and welfare charities is not based on opposition by federal officials to the views of the groups that are thereby excluded.

Brief of Petitioner at 30.

The history of Planned Parenthood's struggles with Petitioner for continued participation in the CFC makes clear, however, that the Executive Order forms an important part of Petitioner's campaign to expel Planned Parenthood from the federal charity drive because of his disagreement with its views on abortion, in violation of the second prong of the test enunciated in *Perry*.

Before his appointment to federal office in 1981, Petitioner was involved in the anti-abortion movement as a director of the LIFE-PAC group. He has made no secret of his feelings toward Planned Parenthood, frequently expressing his abhorrence of its "promotion" or practice of abortion[1] and expressing the opinion that "in a just world" it would not be part of a charitable campaign. (See discussion at pages 7, 11 *infra*). But he has by no means stopped at expression of his personal views; he has used his office to try to carry them into effect to the prejudice of Planned Parenthood.

Prior to Petitioner's tenure at the Office of Personnel Management (OPM) Planned Parenthood's right to participate in the CFC had seemed secure. It had been part of the Campaign since 1968, soliciting funds for its international family planning programs under its registered service mark "Planned Parenthood-World Population". Although anti-abortion groups had protested Planned Parenthood's participation in the CFC at the yearly meetings of the National Eligibility Committee, a group which recommends charities to be included in the campaign, both the Committee and the Director of OPM had always found that Planned Parenthood met all criteria for participation in the campaign and decided for its continued inclusion in the CFC. With Petitioner's appointment to head OPM, things changed.

In the fall of 1981 Petitioner drafted and sent to the White House a proposed executive order that would have excluded Planned Parenthood from the CFC by disqualifying organizations which provide abortions, abortion related services or counseling or referrals to other organizations that provide such

---

1 Planned Parenthood does not itself perform abortions either in the U.S. or overseas. It does, however, publicly advocate, lobby and litigate in order to defend a women's constitutional right to abortion recognized in *Roe v. Wade*, 410 U.S. 113 (1973). Abortion services are provided by approximately 40 local Planned Parenthood affiliates and all 187 affiliates provide referrals for abortion and counseling in the options available to a pregnant woman, including abortion, adoption and keeping the child. Neither Planned Parenthood nor its affiliates "promotes" abortion.

services. In addition, the proposed order, like the one at issue in this case, would have barred from the campaign organizations which attempt to change public policy through lobbying and litigation. In a memorandum to the Director of Cabinet Administration accompanying the proposal, Petitioner listed Planned Parenthood-World Population, along with all of the Respondent legal defense funds that were then participants, as among the limited number of organizations expected to be disqualified from the CFC on the basis of the criteria he was recommending. The White House declined to adopt the proposed executive order drafted by Petitioner and, instead, issued Executive Order 12,353 which did not attempt to bar participation by groups on the basis of their views or actions regarding abortions or their participation in advocacy or litigation.

At about the same time, Petitioner altered the membership of the 1982 CFC's National Eligibility Committee by appointing to it persons with known anti-abortion viewpoints. Notably, Petitioner appointed Terrence Scanlon, who had been the chief spokesperson for the public anti-abortion opposition to Planned Parenthood at the prior year's Committee meeting. Petitioner's efforts paid off and on July 23, 1982 the National Eligibility Committee voted to recommend the exclusion of Planned Parenthood from the CFC on the ground that it was "controversial." Upon receipt of the Committee's recommendation, however, Petitioner stated he felt legally compelled to admit Planned Parenthood to the CFC. Petitioner expressed his regret and revulsion at doing so in a press release.

> "As much as I agree with [the Committee's] view that Planned Parenthood, because of its role in promoting the detestable practice of abortion, should not receive funds by this route, I am legally bound to admit any organization which meets the technical membership requirements," Devine declared. "Therefore, I am reluctantly approving Planned Parenthood for membership in the CFC in 1982. I do believe, however, that this matter is

> ripe for legislative solution, so that abortion groups can be excluded from the campaign in the appropriate legal manner."

Press Release of July 23, 1982, cited in *Planned Parenthood Federation of America v. Devine*, No 82-2162, Slip. Op. at A-3-A-4 (D.D.C. 1983), attached hereto as Appendix A (hereinafter *PPFA I*).

Having made that gesture to obeying the law governing his actions, that evening Petitioner ejected Planned Parenthood from the International Service Agencies (ISA) fundraising group, the category under which Planned Parenthood had participated in the CFC for the prior 14 years, and reclassified it to the National Service Agencies (NSA) group. This seemingly technical change—later ruled unconstitutional—resulted in Planned Parenthood's exclusion from many local campaigns[2] and would have cost Planned Parenthood nearly $200,000 in undesignated employee contributions.[3] *PPFA I*, Appendix A.

In *PPFA I* the court, on Planned Parenthood's motion for summary judgment, ruled that Petitioner's action in switching Planned Parenthood's fundraising category was improper be-

2 ISA groups need seek only a single national approval to participate in the CFC across the nation and overseas, while NSAs must submit separate applications to the 550 local CFC committees at federal employee work sites. This was, in fact, what Planned Parenthood was forced to do as a result of Petitioner's last minute action reclassifying it to an NSA. Petitioner's switch left Planned Parenthood only 17 days to accomplish this major administrative task. As a result of the litigation it instituted, Planned Parenthood secured an additional 14 days to apply locally. Even with the extra time, Planned Parenthood was denied permission to participate in approximately 70 local campaigns, resulting in an estimated loss of $125,000.

3 ISA groups, unlike NSAs, receive a share of "undesignated" employee contributions. By litigation challenging the switch, Planned Parenthood succeeded in establishing an escrow arrangement, which eventually secured its share of these funds as an ISA, after the switch was held unconstitutional.

cause it was based on a "secret rule," adopted essentially simultaneously with Planned Parenthood's transfer, and known only to the federal bureaucrats involved, in violation of Planned Parenthood's first amendment right to receive notice and fair warning of official regulations governing expressive activity. The court rejected Petitioner's motion for summary judgment on Planned Parenthood's alternative contention that the transfer was illegal because it was the product of Petitioner's bias. The court cited Petitioner's views expressed in the July 23, 1982 press release, his recommendation for an executive order that would have barred pro-choice organizations from the CFC and his last minute effort to classify Planned Parenthood as an NSA as "ample basis to support the inference that Petitioner's bias motivated his decision." *PPFA I*, Appendix A, Slip op. at A-8.[4]

During the pendency of the litigation in *PPFA I*, the President promulgated Executive Order 12,404, the subject of the present case, which excluded from the CFC groups which pursue their charitable purposes through advocacy and litigation. Order 12,404 is substantially identical, so far as advocacy and litigation are concerned, to Petitioner's earlier draft, rejected by the President, by which Petitioner expected to disqualify Planned Parenthood from the CFC.

Days after the district court's July 15, 1983 order holding Executive Order 12,404 unconstitutional, Petitioner announced at a Congressional hearing that he would apply the court order only to the plaintiffs named in that case. Congressional Statement, *supra* page 3. In order to protect their position in the CFC, therefore, Planned Parenthood, along with the Native American Rights Fund (NARF), filed suit in the District Court for the District of Columbia, seeking to enjoin Petitioner from applying the unconstitutional criteria of the Executive Order to their CFC applications. On July 26, 1983 the district court ordered, with consent of Petitioner, that the plaintiffs not be excluded from the CFC on the basis of the disputed portions of

4 Petitioner voluntarily dismissed his appeal of *PPFA I*.

the Executive Order. *Planned Parenthood Federation of America v. Devine*, No. 83-2118 (D.D.C. 1983). Stipulation and Order annexed hereto as Appendix B. (Hereinafter, *PPFA II*.)

Petitioner promptly proceeded to try to evade the court's order. At its August 31, 1983 meeting the hand-picked National Eligibility Committee again voted to exclude Planned Parenthood. This time anti-abortion groups, in addition to objecting to Planned Parenthood's views on abortion, sex education, and contraception, accused Planned Parenthood of not meeting financial criteria for admission to the campaign. Although no such concerns had been raised by the OPM staff—which had reviewed all applications for "technical" qualifications and had raised questions about many others—Petitioner decided to hold an unprecedented series of "hearings" to pursue the question of whether there was some technical violation that would provide a basis to exclude Planned Parenthood. At the same time he admitted a record 149 charitable organizations to the campaign, including the Moral Majority Foundation and "right-to-life" groups as well as the Respondents in this case.

During three days of hearings, Planned Parenthood representatives documented the organization's compliance with the campaign's financial requirements. Although the hearings ended September 9, 1983, by the following week Petitioner still had not ruled on Planned Parenthood's status. The matter was urgent because the 550 local CFC committees were scheduled to finalize their lists of eligible charities by September 19.

On September 14, 1983, therefore, Planned Parenthood filed a motion in the district court seeking enforcement of the court's order of July 26, 1983 which had barred Petitioner from applying to Planned Parenthood the unconstitutional criteria of the Executive Order. The court found Petitioner in violation of the order and directed him to issue a decision as to Planned Parenthood's CFC eligibility "supported by cogent reasons" by 3:00 p.m. of that day. The court noted:

> It cannot be overlooked that Planned Parenthood has participated in the CFC each year since 1968 and in 1981 and 1982 was granted national eligibility by defendant Devine. Throughout the prolonged investigation of Planned Parenthood, defendant has stated no specific reason for the extra attention now focused on this agency, aside from the suggestions, without noted evidence supporting them, that financial problems exist and that this is a "controversial" agency. At the eligibility hearing on September 2 defendant stated his own views of Planned Parenthood as follows:
>
> > "Everybody knows where I [Director Devine] stand in regard to the kind of practices that Planned Parenthood does. You promote abortions; I think that detestable. I think in a just world, you'd have nothing to do with a charitable drive."
>
> Indeed, the controversial nature of this organization and the vocal opposition of pro-life groups appear to be either the primary factor delaying a decision, or a paramount consideration in that delayed decision.
>
> Defendant's failure to resolve this matter, despite ample opportunity to so so, and the erosion of time in which to appeal a rejection or notify local campaigns of national eligibility in the event that the application is eventually accepted, amounts to a denial of Planned Parenthood's opportunity to participate in the CFC and is a direct limitation of the Court's Order in this regard.

PPFA II, Slip op. at C-3, annexed hereto as Appendix C.

Petitioner issued his decision at 2:50 p.m. on September 14 denying Planned Parenthood's application on the ground that the organization followed the wrong accounting standards, specifically that ..s independent public accountant had used the wrong words in certifying its financial statements. On September 15, after Planned Parenthood had shown that the so-called technical objections were without merit, and that accountants

for admitted groups had used a variety of forms of certification, the Court overruled Petitioner's decision and ordered Petitioner to admit Planned Parenthood to the CFC forthwith. The Court said:

> In light of the differential treatment, the extraordinary and inexplicable delays in the consideration of plaintiff's application, the overall tone of the continuous inquiries, the controversial nature of plaintiff's activities, and defendant's admitted bias against those activities, the Court must conclude that defendant's proffered grounds for denial are merely pretextual, and directly counter this Court's 1983 Orders, both July 15 and 26.

PPFA II, Slip op. at D-2-D-3, annexed hereto as Appendix D. Despite Petitioner's fervent efforts, Planned Parenthood was, therefore, admitted to the CFC for Fall 1983.[5]

The above history demonstrates Petitioner's desire to eliminate from the CFC a speaker and viewpoint that he abhors. Planned Parenthood submits that this history of bias manifested in his administration of the CFC raises a serious question whether the Executive Order violates *Perry*'s second standard—absence of an effort to suppress views opposed by the public officials involved. At the least, it should lead this Court, as it did the court of appeals, to view with suspicion Petitioner's other, purportedly neutral and "reasonable" explanations for the Executive Order. 727 F. 2d at 1262-64.

Petitioner's attempted use of his position to combat an organization he dislikes also dramatizes the dangers inherent in one of the major explanations articulated by Petitioner for excluding Respondent legal defense funds from the CFC—that they are "controversial." The court of appeals noted that Petitioner's treatment of Planned Parenthood starkly illustrated the possibility that the excuse of "controversiality"

---

5 The September 15 order technically was a temporary restraining order until a full hearing on the merits. Petitioner the next day agreed to waive the further hearing and to admit Planned Parenthood to the CFC as an ISA.

could be used to suppress speakers to which government officials are hostile. On the basis of Petitioner's treatment of Planned Parenthood, the court, therefore, felt compelled to examine "very carefully" Petitioner's attempt to explain the Executive Order as necessary to exclude so-called "controversial groups," 727 F. 2d at 1262, and to find the explanation constitutionally inadequate.

Likewise, the Court should view with suspicion Petitioner's expressed desire to avoid the appearance of government support for "political advocacy" groups. If anything has "politicized" the campaign it has been Petitioner's harassment of Planned Parenthood for its defense of constitutionally protected rights in the area of abortion. The court of appeals agreed. Noting the inclusion of groups such as the Moral Majority Foundation in the 1983 CFC and the exclusion of Planned Parenthood, the court said,

> One can hardly envision decisions more likely to lead to outcries of 'politicization' and demands for boycotts. The Government cannot simply 'pick and choose' its controversies as a means to restrict speech by those it views disfavorably.

727 F.2d at 1264.

The history recorded here reveals that Petitioner misused his public office to pursue a campaign of harassment against an organization that he personally hated. It is just this type of vindictive animus and abuse of power that the first amendment was designed to guard against.

II THERE IS NO REASONABLE BASIS FOR DISTINGUISHING BETWEEN "TRADITIONAL HEALTH AND WELFARE CHARITIES" AND GROUPS ENGAGED IN LEGAL ADVOCACY.

In this Court, Petitioner lays great stress on the idea that the CFC should be limited to "traditional" charities. The court of appeals concluded that there was no reasonable basis for distinguishing between Respondent legal defense funds, which

Petitioner seeks to exclude from the CFC, and "traditional" health and welfare charities. Key to the court's analysis was its view that, no less than traditional charities, legal defense funds—like other groups potentially excluded under the Order—conform to the Order's requirement that all CFC charities "provide or support direct health and welfare services to individuals and families." 727 F. 2d at 1258. The court found that legal defense funds provide such services by seeking judicial enforcement of the common law, statutory and constitutional rights of their clients, thereby obtaining direct benefits for the needy in such forms as back pay, better housing and education and, in the case of the NAACP Legal Defense and Educational Fund's capital punishment project, life itself. *Id.* at 1260.

Planned Parenthood embodies the provision of direct human services through litigation in a unique way. Planned Parenthood is dedicated to direct delivery of medical and educational services to individuals. With 735 local clinic sites, and a $17 million foreign assistance program, Planned Parenthood and its affiliates together form one of the world's largest private organizations delivering and supporting medical services relating to fertility control. While not its primary mission, litigation has been indispensable to Planned Parenthood in achieving its goal of providing individuals with the means to choose when and whether to bear children. For, from the beginning, Planned Parenthood's services have been fraught with controversy and the organization has been forced to resort to litigation and vigorous advocacy in order to defend its clients' right to receive those services.

One of the earliest instances of the need for litigation to defend the right to obtain birth control information was the arrest in 1917 of Margaret Sanger, Planned Parenthood's founder, for opening the first American birth control clinic in Brooklyn, New York. The appeal of her conviction established the principle that physicians may distribute contraceptives to married women for health reasons. *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918).

Since then, Planned Parenthood and its affiliates have appeared as parties and *amici* in numerous cases before this Court and the lower federal and state courts supporting the right of individuals to family planning and abortion services.[6] For example, Estelle Griswold, executive director of the Planned Parenthood League of Connecticut, was the defendant in the criminal case in which this Court announced married persons' right to use birth control. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Planned Parenthood filed *amicus* briefs in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), the cases which declared abortion constitutionally protected. Other Supreme Court reproductive rights cases in which Planned Parenthood participated as *amicus* include *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), *Carey v. Population Services International*, 431 U.S. 678 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *H____ L____ v. Matheson*, 450 U.S. 398 (1981); *City of Akron v. Akron Center for Reproductive Health*, 103 S.Ct. 2481 (1983); *Planned Parenthood of Kansas City, Mo. v. Ashcroft*, 103 S.Ct. 2517 (1983); *Bolger v. Youngs Drug Products*, 103 S.Ct. 2875 (1983). Cases in which Planned Parenthood affiliates appeared as a party include the *Danforth* and *Ashcroft* cases, *supra* as well as *Harris v. McRae*, 448 U.S. 297 (1980) and *Colautti v. Franklin*, 439 U.S. 379 (1979).

Planned Parenthood was itself a plaintiff in the litigation which overturned the so-called "squeal rule," a federal regulation which would have required family planning providers to

6 It is unclear what status Planned Parenthood's litigation activities would have under the Executive Order's exclusion of charities which litigate "on behalf of parties other than themselves," since it normally sues on its own behalf, though sometimes in conjunction with others. However, Petitioner's implementing regulation would have excluded charities which bring litigation in their own names but do so in order to further their "policy goals" rather than their own "direct and private interest." 5 C.F.R. 950.101 (a)(1)(v)(C), 48 Fed. Register 29458, 29460 (June 24, 1983). It appears, therefore, that Petitioner intended to use much of Planned Parenthood's activity as a party or *amicus* in reproductive rights cases to disqualify it from CFC participation.

notify the parents of teenagers when distributing contraceptives to them. *Planned Parenthood Federation of America v. Heckler*, 712 F. 2d 650 (D.C. Cir. 1983). This litigation was of direct benefit to thousands of teenagers who might have shunned family planning clinics and become pregnant had the rule gone into effect. 712 F. 2d at 660-61. Planned Parenthood has also supported litigation establishing the right of nurse practitioners to provide basic reproductive health care. See *Sermchieff v. Gonzales*, 660 S.W. 2d 683 (Mo. Sup. Ct. 1983) (*amicus* brief of Planned Parenthood and other organizations). This litigation directly benefited needy individuals who rely on the affordable services which nurse practitioners provide; it also furthered the federal government's policies on use and training of nurse practitioners in order to hold down the cost of medical care. In addition, Planned Parenthood has, since the mid-1970's, maintained a program of grants and technical assistance to its affiliates and others engaged in litigation, and since 1981, maintained in-house counsel specializing in litigation.

Planned Parenthood's situation illustrates the dangers of an effort by government to define a class of "traditional," non-controversial, "consensus" charities that it will deem sufficiently worthy of federal employees' support to admit to the CFC. Planned Parenthood is nearly 70 years old and it has been part of the CFC since 1968—surely "traditional" by longevity standards. Yet, throughout Planned Parenthood's history, litigation has played an essential and integral role in carrying out its primary mission of assisting individuals to control their fertility. In fact, without that litigation Planned Parenthood's family planning and abortion services simply could not have been provided legally, *see e.g., Sanger, Griswold* and *Roe, supra*, and existing services, notably its services to minors, would have been severely curtailed, *see e.g., Danforth, Bellotti, Akron,* and *PPFA v. Heckler, supra*. By eliminating from the CFC any charity which litigates to secure the rights of the people it serves, the Executive Order will severely penalize conduct which is not only constitutionally protected, *NAACP v. Button*, 371 U.S. 415 (1963), but essential to the very existence of even the most "traditional" charities that must weather times when public opinion labels their services "controversial."

The long history of Planned Parenthood's pursuit of its charitable ends through provision of both direct medical and educational services and litigation also illustrates the absurdity of Petitioner's contention that the Executive Order will return the CFC to its "original scope." Planned Parenthood's litigation activity predates by half a century its entry into the CFC in 1968 and those activities have continued unabated since then. Yet, until the advent of the disputed Executive Order, Planned Parenthood's litigation activities were never viewed as incompatible with its primary charitable purposes. By disqualifying any organization which engages in litigation to affect public policy, the Executive Order threatens with exclusion from the CFC Planned Parenthood and other organizations which have participated in the CFC for many years as part of its core of so-called "traditional" health and welfare charities, but who have been forced to litigate (or otherwise deal with public policy issues) in pursuit of their charitable goals.[7]

7 The Executive Order is quite clear that an organization that spends *any* funds on advocacy activities, including litigation and lobbying, is subject to being disqualified from CFC participation. The proposed regulations, now superseded, that would have implemented the order disqualified only those organizations which spend 15% or more of their budgets on "advocacy" activities. 5 C.F.R. 950.101 (a)(2), 48 Federal Register § 29458, 29460 (June 24, 1983). This percentage dispensation—apart from being inconsistent with this Court's holdings in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) and *Secretary of State of Md. v. Munson*, 81 L. Ed. 2d 786 (1984)—does little to ease the concern of Planned Parenthood or other organizations with active public affairs programs, especially given the absence of standards for defining what policy-related activities count against the limit.

Planned Parenthood also submits that there is a serious question whether an Executive Order, much less an OPM regulation, can validly impose more stringent limits than Congress has set on the right of charities to engage in protected expression on public policy issues. For example, the 15% limit would have included litigation, lobbying and action on administrative regulations, while the tax laws allow organizations exempt under 26 U.S.C. 501(c)(3) to spend a higher percentage on lobbying alone without limitation on expenditures for litigation and action on administrative rulemaking. 26 U.S.C. § 4911.

Planned Parenthood's pursuit of its charitable goals through direct medical and educational services and litigation uniquely illustrate the artificiality of Petitioner's attempt to distinguish between "advocacy group" and "traditional" charities. Even "traditional" charities, when their services become controversial, may be forced to resort to the courts to vindicate their clients' rights. Any discrimination based on the pursuit by an organization of litigation in the public interest is wholly unreasonable and, therefore, unconstitutional.

CONCLUSION

For all the foregoing reasons, Executive Order 12,404 should be held unconstitutional.

Respectfully submitted,

DARA KLASSEL
EVE W. PAUL
ROGER K. EVANS

Planned Parenthood Federation
of America, Inc.
810 Seventh Avenue
New York, NY 10019
(212) 541-7800

Attorneys for Amicus Curiae

January 18, 1985

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2162

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.,

Plaintiff,

—v.—

DONALD J. DEVINE,

Defendant.

MEMORANDUM OPINION

This dispute centers on the classification of a charitable organization as a particular type of participant in the Combined Federal Campaign (CFC), the annual charitable fund-raising drive conducted by the United States Government among its employees. Plaintiff Planned Parenthood Federation of America, Inc., an organization devoted to the encouragement of family planning, has brought this action against defendant Donald J. Devine, Director of the Office of Personnel Management (OPM) under whose auspices the CFC is administered. Plaintiff maintains that the manner in which defendant altered its status from an International Service Agency (ISA) to a National Service Agency (NSA) on July 23, 1982, violated plaintiff's rights under the first and fifth amendments as well as the Administrative Procedure Act (APA). Consequently, plaintiff requests declaratory relief that its rights were abridged and injunctive relief barring defendant from treating plaintiff as an NSA with respect to the 1982 CFC. This matter is before the Court on cross-motions for summary judgment. There are no material facts in dispute,[1] *see* Fed. R.

1 The events that transpired when plaintiff was classified as an NSA are not subject to material dispute. The legal significance of these events and the characterizations that the parties wish to attach to the events, however, are subject to serious disagreement.

Civ. P. 56, and since the manner in which plaintiff was classified as an NSA contravened its rights under the Constitution and the APA, the motion for summary judgment by plaintiff will be granted.

I. Factual Background

Before describing the precise manner in which the classification of plaintiff as an NSA was accomplished, it is necessary to discuss briefly how the CFC generally is administered.[2] There are five voluntary groups in which charitable organizations desiring to participate in the CFC are classified: United Way Agencies (local united funds or community chests recognized by the United Way of America), National Health Agencies, the American Red Cross, International Service Agencies, and National Service Agencies. To participate in the CFC, NSAs and ISAs must satisfy varying requirements. For example, NSAs must be approved by the nationwide campaign and by each local CFC in which they desire to participate in order to ensure that the NSAs provide "direct and substantial services" to the public in each local CFC. *See National Black United Fund (NBUF II) v. Devine*, Civil Action No. 81-2531 (D.D.C. Nov. 17, 1981) (upholding requirement of "direct and substantial services" against challenges under APA and first amendment for vagueness). In contrast, ISAs must obtain approval only from the nationwide campaign since a requirement of a local presence would be inconsistent with the fact that ISAs generally perform their services overseas. When federal employees contribute to the CFC, they have the option of designating that a particular charitable organization(s) should receive their contributions or of allowing their undesignated funds to be distributed in a manner determined by the local CFC.

With this thumbnail sketch of the essential elements of the administration of the CFC, attention now can be directed to

2 For a more detailed explanation of the operation of the CFC, *see National Black United Fund, Inc. (NBUF I) v. Devine*, 667 F.2d 173, 174-76 (D.C. Cir. 1981); *NAACP Legal Defense and Educational Fund, Inc. (NAACP LDF II) v. Devine*, 560 F. Supp. 667, 670-71 (D.D.C. 1983).

the events surrounding the classification of plaintiff as an NSA. For thirteen years, including the 1981 CFC administered by the defendant in the present action, plaintiff was classified as an ISA. On July 6, 1982, OPM published final regulations which, *inter alia*, established standards for eligibility for the participation of charitable organizations in the CFC. *See* 47 Fed. Reg. 29496-29512. Apart from continuing the "local presence" requirement for NSAs,[3] these regulations made no attempt to define differences between NSAs and ISAs. On July 23, 1982, the National Eligibility Committee (an advisory group convened to consider what charities should be admitted to the CFC) recommended that plaintiff should be excluded from the 1982 CFC.[4] Notwithstanding this recommendation, OPM issued a press release on the same date which stated:

> "As much as I agree with their view that Planned Parenthood, because of its role in promoting the detestable practice of abortion, should not receive funds by this route, I am legally bound to admit any organization which meets the technical membership requirements," Devine declared. "Therefore, I am reluctantly approving

3 Defendant suggests that the regulations of July 6, 1982, "provide a common-sense standard—provision of services overseas—for treating an organization as international for purpose of the local presence requirement." Defendant's Statement of Material Facts (SMF) 36. The regulatory provisions that defendant cites for this proposition, *see* 5 C.F.R. §§ 950.309(a)(2), 950.405(a)(6) & 950.407, provide no such standard. That the July 6th regulations give no guidance for distinguishing between ISAs and NSAs is confirmed by defendant's concession that an unpublished, draft memorandum was the basis for the decision to classify plaintiff as an NSA instead of an ISA. *See* Defendant's SMF 37. Assuming *arguendo* that any standard to distinguish ISAs from NSAs can be derived from the July 6th regulations, the critical point is that such an implied standard was not relied upon in the classification decision of July 23, 1982. *See* Defendant's Letters Denying Plaintiff's First and Second Requests for Reconsideration (August 2 and 5, 1982).

4 Of the 117 charitable organizations that had participated in prior CFCs, plaintiff was the only one that the National Eligibility Committee recommended should not be admitted to the 1982 CFC.

> Planned Parenthood for membership in the CFC in 1982. I do believe, however, that this matter is ripe for legislative solution, so that abortion groups can be excluded from the campaign in the appropriate legal manner."

That evening, however, defendant determined that plaintiff should be admitted to the CFC as an NSA rather than an ISA for the domestic campaign. Accordingly, a letter was sent to plaintiff that day advising that it had been classified as an NSA.

There is no dispute that the basis for the classification of plaintiff as an NSA on July 23, 1982, was a draft memorandum containing handwritten insertions and changes. At the time that defendant reclassified plaintiff, there had been no public notice of the draft memorandum. In fact, it appears that only defendant, an assistant, and OPM's Office of General Counsel (that assisted in drafting the memorandum) knew that it existed on July 23, 1982. Despite numerous consultations with OPM staff after being notified of the classification decision, plaintiff was provided no explanation for its classification as an NSA. On July 29, 1982, plaintiff sent a letter to defendant requesting reconsideration of its classification as an ISA. Defendant responded by letter on August 2nd denying the request for reconsideration.[5] Plaintiff

5 For the first time, defendant attempted to provide some explanation for his action. The August 2nd denial of the request for reconsideration provides in pertinent part:

> The distinction between ISA and NSA is the distinction between charitable services rendered overseas and those that are provided domestically to Americans. PPF of A's national application materials plainly indicate that its activities are significantly domestic in scope. PPF of A reported a total of $158,025,333 in support and revenue in 1980. Only $16,861,383, representing just 10.6% of that revenue, was expended for international services.

While defendant's reasoning was revealed to some extent, plaintiff was unaware of the draft memorandum upon which its classification as an NSA rested. Hence, although it may be charitably claimed that plaintiff was given some hint of the basis for its classification, *see* Defendant's SMF 39, there can be no basis for the assertion that the August 2nd letter informed plaintiff of defendant's assignment standards since those standards which were contained in the draft memorandum still had not been disclosed. *See id.*

filed the instant action on the next day with an application for a temporary restraining order. On August 4, 1982, defendant finally revealed his basis for classifying plaintiff as an NSA when he disclosed the decisional standards in the Federal Personnel Manual (FPM). Those standards provided that "[a] voluntary agency whose services are rendered exclusively or in substantial preponderance overseas will be assigned to ISA" and "all other voluntary agencies, including those of a mixed character, will be assigned to NSA." FPM Letter No. 950-1, § 2(d)(1) & (3) (August 4, 1982). At the same time that the decisional standards were disclosed, defendant invited plaintiff to submit a second request for reconsideration, an invitation which plaintiff accepted by gathering all the materials that it believed relevant and submitting them to defendant that day. On the next day, defendant denied the second request for reconsideration and for the first time provided a full explanation for the July 23rd action that classified plaintiff as an NSA.

The classification of plaintiff as an NSA allegedly has injured plaintiff in several respects. The most serious financial effect is that being classified as an NSA excluded plaintiff from some local CFCs,[6] depriving it of both designated and undesignated contributions. In addition, plaintiff anticipates receiving far less undesignated funds from the 1982 CFC because NSAs traditionally are awarded a much smaller percentage of

6 Despite the fact that the regulations of July 6, 1982, refer to undesignated funds as "deemed designated funds," the Court will employ the terminology in use prior to the promulgation of the regulations for convenience. Defendant has submitted an affidavit suggesting that in the largest local CFC, plaintiff would receive approximately half the undesignated funds received from 1981 CFC if it would have been classified as an ISA for the 1982 CFC. *See* Affidavit of William A. Schaeffler, Director of the National Capital Area CFC. Although this affidavit is probative on the amount of undesignated funds lost by plaintiff due to classification as an NSA, there appears to be no dispute that plaintiff would receive a substantial amount of additional undesignated funds—approximately $100,000—if it would be viewed as an ISA for the 1982 CFC.

undesignated contributions than are ISAs.[7] A final effect that classification as an NSA may have had on contributions is that some potential contributors may have contributed less to plaintiff because they attached some significance to its prior status as an ISA or became confused by the reclassification for 1982 as an NSA. The last injury allegedly suffered is the loss of the established relationship with other ISAs and the coordinating body for the ISAs, International Service Agencies—Federal.[8]

II. Legal Analysis

To challenge the manner in which defendant classified plaintiff as an NSA, plaintiff has advanced four legal arguments. First, plaintiff contends that the classification violated its first

---

7 The litigants have submitted a series of affidavits concerning how many local CFCs excluded plaintiff and the reasons for those exclusions. Accepting defendant's representations which should portray defendant at least as favorably as plaintiff's representations, 113 local CFCs denied plaintiff's participation but plaintiff successfully appealed those determinations in 86 instances. *See* Affidavit of Kent Bailey, Program Analyst at OPM. Of the 27 campaigns where OPM upheld plaintiff's exclusion, 14 were appeals submitted to OPM in an untimely manner, 9 were instances where a local presence had not been demonstrated, 2 were cases where the initial applications to the local CFC were untimely, and 2 were local CFCs where plaintiff's affiliate already was participating. *See id.* Aside from the two campaigns where a representative of plaintiff was included, defendant thus concedes that plaintiff was excluded entirely from 24 local CFCs. In addition, however, defendant has not disputed that in 29 of the "successful" appeals, the local CFCs still excluded plaintiff because OPM's action was too late. *See* Affidavit of Captain Robert S. Brookings, Director of Plaintiff's CFC Activities ¶ 7. Moreover, plaintiff was informed of its exclusion in 17 other CFCs long after the time to appeal to OPM had passed. *See id.* ¶ 8. Hence, plaintiff was not permitted to participate in approximately 70 local CFCs in which plaintiff estimates over $125,000 in designated contributions would have been received. *See id.* ¶ 9.

8 The ensuing analysis will rest on the undisputed injuries of the loss of undesignated funds and the exclusion from some local CFCs which bars the receipt of designated funds. To substantiate the last two alleged injuries, plaintiff would have to make satisfactory showings at an evidentiary hearing.

amendment rights because final agency action rested on a secret rule defining ISAs. Second, plaintiff maintains that the classification violated its first amendment rights because it would not have occurred if defendant had not determined to penalize plaintiff for its stance in favor of abortion. Third, plaintiff claims that the definition of ISAs that it allegedly did not satisfy was unconstitutionally vague under the first amendment. Fourth, plaintiff suggests that defendant failed to comply with the APA in releasing the rule defining ISAs on August 4, 1982, because the rule was not published in the Federal Register. Defendant has filed a motion for summary judgment on all four claims while plaintiff has filed a similar motion on all claims except defendant's alleged bias against plaintiff as a motivating factor for classification as an NSA. For the following reasons, the Court will grant plaintiff's motion for summary judgment on the ground that employing a secret rule to classify plaintiff as an NSA violated plaintiff's rights under the first amendment and the APA.

Although only plaintiff's first claim with the additional basis of the APA provides justification for granting summary judgment to plaintiff, the other three claims merit some attention. Initially, there can be no doubt but that defendant's motion for summary judgment on the issue of defendant's animus toward plaintiff as the cause of the classification is ill-founded. The Supreme Court has established clear standards by which to evaluate this claim. *See Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Plaintiff must demonstrate by a preponderance of the evidence that defendant's decision was made by reason of the exercise of its first amendment rights to encourage family planning through various means including abortion. *See id.* at 283-84 Defendant then would have to demonstrate by a preponderance of the evidence that he "would have reached the same decision" even if plaintiff had not engaged in its protected first amendment conduct. *Id.* at 287. Defendant's July 23, 1982, press release expressing that he found plaintiffs exercise of its first amendment rights to promote abortions detestable is alone sufficient to create a material issue of fact. Combining defendant's

statement with his recommendation for an executive order that would bar any pro-abortion charities from the CFC and the last-minute effort to classify plaintiff as an NSA (and failing to subject other ISAs to the new ISA definition until a somewhat later time) provide an ample basis to support the inference that defendant's bias motivated his decision. Moreover, these same undisputed facts block defendant's claim on summary judgment that plaintiff would have been classified as an NSA regardless of its pro-abortion position.[9] Of course, defendant is correct that all of these facts also may be explained by innocuous reasons. Yet, it is hornbook law that where undisputed facts fairly support conflicting inferences—particularly where bias or animus is at issue—a trial is essential.[10] Accordingly, defendant's motion for summary judgment on the issue of bias employed to punish the exercise of first amendment rights must be denied.

While the grant of summary judgment will not rest on plaintiff's claims of vagueness and inadequate notice, defendant should be apprised if he chooses to present an ISA definition through appropriate means that there is a substantial likelihood that the present rule would have to be defined more extensively to withstand a vagueness challenge and would have to be published at the appropriate time in the Federal Register. Two recent cases in this judicial district have considered vagueness challenges to definitions provided by OPM for the CFC. *See NBUF II v. Devine, supra; NAACP Legal Defense Fund*

9 For example, defendant's recommendation of an executive order barring any pro-abortion group from the CFC creates a material issue of fact whether the NSA classification would have resulted absent plaintiff's exercise of its first amendment rights.

10 Defendant contends that he had no personal knowledge of the distribution arrangement for undesignated funds from the 1982 CFC. Yet, plaintiff still is entitled to prove that defendant contemplated that the undesignated funds would be distributed in a manner similar to past CFCs when ISAs received significantly greater undesignated funds than NSAs. Defendant has not denied that he was aware that classifying plaintiff as an NSA forced plaintiff to demonstrate a local presence in each of the local CFCs in which it wished to particpate.

(NAACP LDF I) v. Campbell, 504 F. Supp. 1365 (D.D.C. 1981). In *NBUF II*, the definition of "substantial services" was upheld because NBUF was among the organizations proposing a virtually identical standard. Further the definition provided both a series of examples of what would constitute "substantial services" and outlined certain activities which would not be required to satisfy the definition. *See* Slip op. at 3, 4 & 9. In contrast, the court in *NAACP LDF I* struck down as vague OPM's definiton of "direct services" because only OPM could explain its definition by stating that certain other charitable organizations satisfied the definition. *See* 504 F. Supp. at 1367. The instant case appears much closer to *NAACP LDF I* than to *NBUF II*. The ISA definition provides no examples of "overseas" activities or activities unnecessary to satisfy this definition and plaintiff had not even a vague hint that the definition was forthcoming. Hence, all that the definition provides is a synonym for the term "international,"—overseas. Moreover, although the term modifying "overseas"—"substantial preponderance" and "mixed character"—"may appear at first glance to have a plain, unambiguous meaning sufficient to guide governmental decisionmaking," *id.*, there is a significant danger that these terms absent some guidelines are too imprecise to withstand a vagueness challenge.[11]

The manner in which defendant classified plaintiff as an NSA also is susceptible to serious challenge under the APA for failure to publish the ISA definition in the Federal Register. Defendant's response is that the ISA definition is an interpretive rule that does not necessitate such formal notice. Defendant contends that the ISA definition merely provided interstitial refinement for an ISA definition present in the regulations of July 6, 1982. There is a strong argument,

11 Defendant's application of the ISA definition also may provide the basis for an equal protection claim. Given plaintiff's assertion that other ISAs were not examined under this definition until several days after plaintiff was classified as an NSA and that other ISAs were not classified as NSAs despite having weaker bases to remain ISAs than plaintiff, it appears that plaintiff can claim that the application of the ISA definition deprived it of equal protection.

however, that there is no definition of "international services" in the July 6th regulation so that the justification for construing the ISA definition as an interpretive rule is questionable. Assuming *arguendo* that the ISA definition is an interpretive rule, it does not appear that defendant has provided any rebuttal to plaintiff's contention that it was OPM practice not to use the Federal Personnel Manual (FPM) for any CFC rules beyond housekeeping matters such as the mechanics for payroll deductions. *See* Deposition of Joseph Patti, at 70. Therefore, past OPM practice may support the conclusion that notice of the ISA definition in the FPM was inadequate under the APA.

Despite the Court's serious reservations with the precision of the ISA definition and the adequacy of notice under the APA, the basis for granting summary judgment to plaintiff is that classifying plaintiff as an NSA with a secret rule violates fundamental requirements of the first amendment and the APA. Before discussing the specific rule at issue, it is necessary to explain the role of the first amendment in evaluating the manner in which plaintiff was classified as an NSA. Initially, it is well established that charitable solicitation is protected activity under the first amendment. *See Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). As Judge Gesell has cogently explained, regulations affecting access to the CFC are subject to first amendment scrutiny:

> Although the mechanisms of the CFC drive do not allow for the sort of persuasive, informative activity that is often present in solicitations on street corners or door-to-door, the participating organizations are afforded favorable publicity concerning their objectives and the money received may be used in some instances for activity that falls squarely within the First Amendment. Furthermore, by providing organizations the opportunity to participate in the CFC, the government has, in effect, provided a billboard or channel of communication through which organizations can disseminate their appeals to federal workers . . . . It is clear that the government must meet

> First Amendment strictures in its regulations concerning access to this channel of communication, which is, in fact, the only channel by which organizations can appeal to government employees at their work place.

NAACP LDF I v. Campbell, 504 F. Supp. at 1366-67 (citations omitted). *See NBUF I v. Devine*, 667 F.2d at 178-79 & n.25 (endorsing Judge Gesell's view of the application of first amendment strictures to CFC regulations). Hence, defendant's classification of plaintiff as an NSA must be examined under the first amendment.[12]

Having concluded that the manner in which defendant classified plaintiff as an NSA must meet the requirements of the first amendment, it remains necessary to determine what particular requirements were not satisfied. When defendant classified plaintiff as an NSA on July 23, 1982, the draft memorandum that concededly formed the basis for defendant's decision was a secret rule that could have no legal effect. In essence, the rule defining ISAs consituted the most extreme form of vagueness, a secret rule known only to the individuals that enforce it. The United States Court of Appeals for the District of Columbia Circuit has outlined the dual policies that underlie the vagueness doctrine. "First, the vagueness doctrine incorporates the idea of notice—informing those subject to the law of its meaning . . . . Second, the doctrine is concerned with providing officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement." *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980).

---

12 Defendant has argued at length that because the classification as an NSA did not exclude plaintiff entirely from CFC, first amendment protection is unwarranted. The Court rejects this expansive argument which suggests that severe obstacles could be imposed to limit the ability to conduct charitable solicitation without activating first amendment interests. Moreover, plaintiff has been totally excluded from participation in approximately 70 local CFCs as a direct result of its classification as an NSA. Plaintiff would have been included automatically in these local CFCs and would have received both designated and undesignated funds if it would have been classified as an ISA. In addition, it is important to note that it is conceded that exclusion from at least nine CFCs occurred due to the failure to show a local presence which only NSAs must demonstrate.

Applying the policies underlying the vagueness doctrine to the instant rule defining the ISAs demonstrates that the rule neither provided adequate notice nor imposed any check on arbitrary and discriminatory enforcement. At the time of final agency action when OPM notified plaintiff of its classification as an NSA on July 23, 1982, plaintiff had no notice of any rule relating to the definition of ISAs. In fact, plaintiff did not become aware of the rule until after defendant denied plaintiff's first request for reconsideration. Therefore, the rule defining ISAs was unconstitutionally vague because plaintiff had no notice of the rule before defendant applied the rule to plaintiff. Applying a secret rule also imposes no restraint on the administrator's ability to engage in arbitrary and discriminatory enforcement. As long as the rule is undisclosed, the administrator has boundless discretion to selectively enforce the "rule" or to change the substance of the "rule" from one day to the next if he so desires.[13] This situation is analogous to that of a licensing authority that regulates speech-related activities through the use of secret guidelines. *See, e.g., Police Department of Chicago v. Mosley*, 408 U.S. 92, 97 (1972) ("licensing schemes that lodge broad discretion in a public official [impermissible] because of their potential use as instruments for selectively suppressing some points of view"); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cox v. Louisiana*, 379 U.S. 536, 555-58 (1968). Thus, "[w]hen the government restricts First Amendment activities, the restriction must *at the outset* be set forth with precision" *NAACP LDF I v. Campbell*, 504 F. Supp. at 1368 (emphasis added). In the present case, the rule defining ISAs was not set forth with precision, much less set forth, prior to defendant's decision to classify plaintiff as an NSA.

Defendant attempts to avoid the conclusion that the secrecy of the rule defining ISAs necessitates finding the rule void for

13 Accepting for the moment that defendant's assertion that the ISA definition of July 23 reflected only his "rough judgment" was not itself a post-hoc rationalization, the assertion confirms that defendant reasonably contemplated changing the secret rule after that rule had been applied to at least one charitable organization in the CFC.

vagueness by advancing three arguments: 1) the standard applied in classifying plaintiff as an NSA was the same standard that had been in effect throughout the history of the CFC; 2) the July 23, 1982, decision classifying plaintiff as an NSA was only an "initial, preliminary" decision; 3) plaintiff was afforded all the process that any court would require when it was able to make a second request for reconsideration. None of these arguments are persuasive.

Defendant's first argument that the same standard that was employed in past CFCs was relied upon to classify plaintiff as an NSA is simply not credible. Plaintiff has been classified as an ISA for thirteen successive CFCs from 1968 through 1981. It is quite significant that plaintiff was classified as an ISA for the 1981 CFC that was administered by defendant himself who concededly applied the eligibility standards to the best of his abilities during that CFC.[14] Moreover, at other points in his pleadings, defendant has maintained that the basis for the NSA classification of plaintiff was the ISA definition derived from the July 6, 1982, regulations and contained in the draft memorandum of July 23, 1982. All of these facts combine to demonstrate that there can be no doubt that the standard employed by defendant to classify plaintiff as an NSA had no precedent in prior CFCs.

The second argument advanced by defendant is that standards truly were in place when he decided how to classify plaintiff on August 5, 1982, and that his decision on July 23, 1982, was only an "initial, preliminary" decision. As has been explained previously, this argument at most highlights the chameleon-like potential of a secret rule that provides no check on arbitrary and discriminatory enforcement.[15] As an effort to

14 Defendant has proferred no reasons why plaintiff's 1981 CFC application varied from the 1982 CFC application in a manner that would have justified classifying plaintiff as an ISA in 1981 and an NSA in 1982.

15 Defendant has pursued contradictory positions. Defendant has attempted to minimize the danger of arbitrary and capricious enforcement of a secret rule by claiming that the rule finally disclosed on August 4, 1982, was identical to the rule defining ISAs in the draft memorandum. Of course, that alleged likeness does nothing to mitigate the fact that a secret standard is

shift the date of the defendant's decision to postpone the point at which standards had to be in place, it fails as a faulty characterization of the entire administrative process surrounding the classification of plaintiff as an NSA. The July 23rd decision plainly constituted final agency action. Defendant never informed plaintiff that the July 23rd decision classifying plaintiff as an NSA was in any sense tentative or preliminary.[16] Regardless of what possible action defendant allegedly would have taken after the July 23rd decision,[17] the fact remains that the classification of July 23, 1982, fixed plaintiff's status as an NSA. If plaintiff had taken no further action, it would have been treated as an NSA for the 1982 CFC. Hence, the July 23rd decision constituted final agency action notwithstanding defendant's inherent ability to reconsider the decision. Perhaps it is arguable that a "final" decision is not reached until after a motion for reconsideration has been considered. Yet, plaintiff's motion for reconsideration was denied without disclosure of the secret rule (or at best was implicit in the denial of the motion for reconsideration) and plaintiff instituted this action the next day, one day before revelation of the rule in the FPM. A determination of final agency action cannot hinge on the number of invitations for reconsideration that are made. Thus, to avoid a determination of void for vagueness, the standard must have been set forth with precision prior to the July 23rd decision classifying plaintiff as an NSA.

---

effectively no standard since it can be manipulated at will. In addition, defendant's position that the July 23rd decision was preliminary in nature undercuts the asserted unchanging nature of the rule between July 23 and August 4, 1982.

16 Defendant was well aware of how to indicate that his decision based on the draft memorandum was only a proposed action or that the rule defining ISAs was only a proposed rule. Yet, defendant never gave any indication that his July 23rd decision was anything other than final.

17 Defendant's assertion that the July 23rd decision reflected only his rough judgment is entitled to less weight because the allegedly flexible nature of the decision is itself a post-hoc rationalization.

The third argument defendent presents to counter a conclusion of void for vagueness is that even if he erred by acting upon a secret rule, he took steps—disclosing the standard on August 4, 1982, and inviting plaintiff to submit a second request for reconsideration which was denied the next day—that adequately remedied any error. In fact, defendant believes that the action he took was as much as any court would have ordered to remedy his earlier reliance on a secret rule. While defendant's allegedly remedial actions address the first policy underlying the vagueness doctrine by giving plaintiff notice immediately prior to the second request for reconsideration, these actions had absolutely no impact on the second policy that use of a secret rule permits arbitrary and discriminatory enforcement.[18] Because defendant's decision to reclassify plaintiff as an NSA was based on a secret rule, any later explanation was necessarily a post-hoc rationalization that could not be accepted. For example, a licensing authority could always claim that it never exercised discretion in an arbitrary and capricious manner. Similarly, defendant's claim that the secret rule in the draft document was not altered prior to its disclosure does not diminish the need to apply the vagueness doctrine to prevent the *opportunity* for arbitrary

---

18 Throughout these proceedings, defendant has ignored the concern of the vagueness doctrine with arbitrary and discriminatory enforcement of a secret rule. Instead, defendant has argued that first amendment interests are limited or nonexistent because the CFC is not a public forum, the regulation is content-neutral, and the inhibition on plaintiff's communication is minimal. It already has been discussed why first amendment principles are fully applicable to CFC regulations so that the issue of a public forum is irrelevant. In addition, it is difficult to construe plaintiff's exclusion from approximately 70 local CFCs with an estimated loss of over $100,000 in designated funds as a minor inhibition on plaintiff's communication. Yet, a broader principle should be addressed. Aside from the discussion in *NBUF I* regarding whether first amendment principles should be applied to the CFC, *see* 667 F.2d at 178-79, the first amendment analysis outlined in *NBUF I*, which defendant apparently has followed, does not appear relevant to the *separate* requirement of the vagueness doctrine. Assuming *arguendo* that the *NBUF I* analysis is applicable to the instant case, defendant has made no attempt to identify a compelling interest for the ISA definition.

and discriminatory enforcement. The vagueness doctrine applies even where no predisposition by the public official of hostility against a particular group can be identified. Where plaintiff freely concedes his hostility toward plaintiff, it becomes even more essential to have a known standard established to check the ability to engage in arbitrary and discriminatory enforcement. Finally, defendant's actions to remedy the effect of a secret rule were insufficient because the only way to correct a secret rule is to start over again with a rule with which plaintiff is aware. In sum, none of the three arguments advanced by defendant avoid the conclusion that the secret rule defining ISAs must be struck down under the first amendment as void for vagueness.

The foregoing discussion explains why defendant's use of a secret rule abridged plaintiff's rights under the first amendment. An independent basis for invalidating defendant's classification of plaintiff as an NSA is that reliance on a secret rule constitutes arbitrary and capricious conduct under the APA. The APA is designed to require some degree of procedure in the administrative process which includes a minimum requirement that there should be public notice of any rule upon which an agency grounds an action involving a particular organization. Classifying plaintiff as an NSA based on a secret rule is such a radical departure from the normal operation of the administrative process that it falls short of compliance with the APA. More precisely, the defendant's July 23rd decision to classify plaintiff as an NSA had no legal justification because the acknowledged basis for the action was secret. Any justification that is later supplied constitutes a textbook example of a post-hoc rationalization which cannot uphold agency action. Thus, defendant's use of a secret rule must be struck down under either the first amendment or the APA.

An Order consistent with the Memorandum Opinion will be entered on this date.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

DATED: August 31, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2162

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.,
Plaintiff,

—v.—

DONALD J. DEVINE,
Defendant.

ORDER

Upon consideration of plaintiff's motion for summary judgment on all issues except bias as a motivating factor for the challenged action, defendant's cross-motion for summary judgment on all issues, the respective oppositions, the accompanying memoranda of law, the argument of counsel, and the entire record herein, it is this 31st day of August, 1983.

ORDERED that the defendant's motion for summary judgment be, and hereby is, denied; and it is further

ORDERED that plaintiff's motion for summary judgment be, and hereby is, granted; and it is further

ORDERED and ADJUDGED that defendant's reliance on a secret rule to classify plaintiff as an NSA on July 23, 1982, violated plaintiff's rights under the first amendment and the APA; and it is further

ORDERED that defendant, his agents, and employees be, and hereby are, directed to take all necessary steps to enable plaintiff to participate as an ISA in the 1982 CFC to the maximum extent possible; and it is further

ORDERED that the above-captioned matter be, and hereby is, dismissed.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2118

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. *et al.*,

Plaintiffs,

—v.—

THE HONORABLE DONALD J. DEVINE,

Defendant.

STIPULATION & ORDER

It is hereby stipulated and agreed by the parties, subject to approval of the Court, as follows:

1. The defendant, his agents and subordinates will not exclude plaintiffs Planned Parenthood Federation of America, Inc., and Native American Rights Fund from participation in the Combined Federal Campaign with respect to the solicitation of "designated contributions," as that term is used in the Memorandum Opinion filed July 15, 1983, in *NAACP Legal Defense and Educational Fund, Inc., et al.* v. *Donald J. Devine ("NAACP LDF III")*, on the basis of the provisions of section (2)(b)(1 through 3) of Executive Order No. 12353, as amended by section 1(b) of Executive Order No. 12404 of February 10, 1983.

2. This stipulation is without prejudice to defendant's rights either to appeal from the July 15, 1983, order in *NAACP LDF III* or to seek clarification of that Order insofar as that Order addresses the provisions of section (2)(b)(1 through 3) of Executive Order 12353, as amended by Executive Order 12404,

or in any other respect not enumerated herein. In the event of an appeal from the July 15, 1983, Order in *NAACP LDF III*, defendant will accord to this stipulation the same effect that ultimately is given to the Court's Order of July 15, 1983, in *NAACP LDF III* by any court competent to review that order.

3. The provisions of paragraph 1 of this stipulation have no greater and no lesser force or effect with respect to plaintiffs Planned Parenthood Federation of America, Inc., and Native American Rights Fund than the provisions of the second decretal paragraph of the Court's Order filed July 15, 1983, in *NAACP LDF III,* have with respect to the named plaintiffs in that action. The provisions of paragraph 1 of this stipulation shall be construed in conformity with the Court's July 15, 1983, Memorandum Opinion in *NAACP LDF III.*

4. Plaintiffs hereby withdraw their pending application for a temporary restraining order and agree not to file a motion for a preliminary injunction. The provisions of paragraph 1 of this stipulation shall be construed as a preliminary, and not a permanent, order.

/s/ STANLEY S. HARRIS
Stanley S. Harris
United States Attorney

/s/ ROYCE C. LAMBERTH
Royce C. Lamberth
Assistant United States Attorney

/s/ JOHN D. BATES/*MRB*
John D. Bates
Assistant United States Attorney

/s/ MITCHELL R. BERGER
Mitchell R. Berger
Assistant United States Attorney

/s/ WALTER B. SLOCOMBE
Walter B. Slocombe

/s/ GEOFFREY JUDD VITT
Geoffrey Judd Vitt
Caplin & Drysdale, Chartered

/s/ DONALD J. SIMON
Donald J. Simon
Sonosky, Chambers, Sachse & Guido

Attorneys for Plaintiffs

So Ordered: /s/ JOYCE HENS GREEN
United States District Judge

Date: July 26, 1983

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2118

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al.,

Plaintiffs,

—v.—

THE HONORABLE DONALD J. DEVINE,

Defendant.

ORDER

This matter comes before the Court pursuant to the motion of plaintiff, Planned Parenthood Federation of America, Inc. (Planned Parenthood) for an order to implement this Court's Order of July 26, 1983 which approved the agreement of the parties that Donald J. Devine, Director, Office of Personnel Management, his agents and subordinates

> will not exclude plaintiffs Planned Parenthood Federation of America, Inc., and Native American Rights Fund from participation in the Combined Federal Campaign with respect to the solicitation of "designated contributions," as that term is used in the Memorandum Opinion filed July 15, 1983 in *NAACP Legal Defense and Educational Fund, Inc., et al. v. Donald J. Devine* * * * on the basis of the provisions of section (2)(b)(1 through 3) of Executive Order No. 12353, as amended by section 1(b) of Executive Order No. 12404 of February 10, 1983.

From the record and argument of counsel it appears that Planned Parenthood is the sole remaining agency whose appli-

cation for national eligibility for participation in the Combined Federal Campaign (CFC) has been neither approved nor rejected due to the failure of the defendant Devine to make such determination. The defendant had designated and utilized September 9, 1983 as the latest date for such decision as to all other agencies seeking like participation, in order to afford the rejected agencies time within which to appeal that rejection. Time is crucial in this cause since Director Devine has ordered that after Monday, September 19, 1983, the approximately 550 local committees across the nation may finalize local participant lists for inclusion in printed brochures to be made available to potential donors.

Planned Parenthood, unlike any other applicant agency, has been the target of scrutiny and investigation, purporting to concern unidentified "technical" objections to its eligibility. On August 29 Planned Parenthood received the first of a series of questions concerning its application; Planned Parenthood responded to those questions on August 31. The initial round of inquiries was followed by the National Eligibility Committee hearing at which opponents of Planned Parenthood attacked the substance of Planned Parenthood's programs and views. On September 1, the Director required further inquiry as to whether Planned Parenthood would be admitted, due to what defendant referred to as "potentially disturbing evidence that the group has not met the CFC's financial and reporting requirements." Devine stated that "[t]hat evidence was presented by pro-life representatives during the National Eligibility Committee hearing yesterday." The parties agree that opposition to Planned Parenthood has come essentially from pro-life groups. The hearing continued on September 2; yet more questions were addressed to this agency; yet more answers were given. Despite Planned Parenthood's prompt response to each round of inquiries, defendant has yet to rule on the application. Needless to say, the plaintiffs' appeal rights in the event of a negative decision have been seriously eroded already and will vanish completely unless immediate action is taken. The time pressure exists even in the event of a decision

favorable to Planned Parenthood, in light of the delays in communicating *any* result to the many local campaigns before they finalize participant lists on Monday.

It cannot be overlooked that Planned Parenthood has participated in the CFC each year since 1968 and in 1981 and 1982 was granted national eligibility by defendant Devine. Throughout the prolonged investigation of Planned Parenthood, defendant has stated no specific reason for the extra attention now focused on this agency, aside from the suggestions, without noted evidence supporting them, that financial problems exist and that this is a "controversial" agency. At the eligibility hearing on September 2 defendant stated his own views of Planned Parenthood as follows:

> Everybody knows where I [Director Devine] stand in regard to the kind of practices that Planned Parenthood does. You promote abortions; I think that's detestible. I think in a just world, you'd have nothing to do with a charitable drive.

Indeed, the controversial nature of this organization and the vocal opposition of pro-life groups appear to be either the primary factor delaying a decision, or a paramount consideration in that delayed decision.

Defendant's failure to resolve this matter, despite ample opportunity to do so, and the erosion of time in which to appeal a rejection or notify local campaigns of national eligibility in the event that the application is eventually accepted, amounts to a denial of Planned Parenthood's opportunity to participate in the CFC and is a direct limitation of the Court's Order in this regard.

The Court is not oblivious to the sensitive and sincere positions of the parties, but the controversial nature of the decision cannot obviate the necessity for a fair and equitable decision. All applicants, including Planned Parenthood, must be afforded an equal opportunity to be accepted or rejected, on a reasoned basis, as a national voluntary agency eligible to participate in the CFC.

It is therefore

ORDERED that should the defendant, Donald J. Devine, fail to issue a decision, supported by cogent reasons, resolving Planned Parenthood's application for admittance to the 1983 Combined Federal Campaign by 3:00 p.m., on September 14, 1983, Planned Parenthood shall, automatically and without further order of this Court, be declared to be a national voluntary agency approved for participation in the 1983 Combined Federal Campaign, and this shall be promptly communicated to all local committees nationwide.

/s/ JOYCE HENS GREEN

Joyce Hens Green
United States District Judge

September 14, 1983

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2118

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. et al.,

Plaintiffs,

—v.—

THE HONORABLE DONALD J. DEVINE,

Defendant.

ORDER

Plaintiff, Planned Parenthood Federation of America, Inc. ("Planned Parenthood") has moved this Court for the entry of an order directing the defendant, Donald J. Devine, to declare Planned Parenthood to be a national voluntary agency approved for participation in the 1983 Combined Federal Campaign (CFC). The history of this case is recounted in the Court's Order of September 14, 1983. In that Order, the Court directed defendant to issue a prompt decision, supported by cogent reasons, as to plaintiff's application. The defendant reached his decision denying plaintiff's application just prior to the 3:00 p.m. time specified by the Court, and plaintiff was advised that it had 10 days to request reconsideration by the defendant pursuant to 5 C.F.R. § 950.407(e) and 48 Fed. Reg. 34914 (Aug. 1, 1983). Planned Parenthood submitted a lengthy request for reconsideration early this morning, September 15, 1983. This request was similarly denied today at approximately 2:30 p.m., at which time the Court indicated it would consider the instant motion as plaintiff's appeal of defendant's decision. The unique and considerable time pressures which accompany this appeal, compel the Court to issue what is, in

essence, a temporary restraining order, rather than a permanent injunction, this date. Plaintiff has demonstrated that it meets the requirements of *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958), and *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

1. Plaintiff has made a conclusive showing of irreparable injury should relief be denied. Defendant has authorized local committees to finalize participant lists for the CFC on Monday, September 19, 1983. Should plaintiff be finally excluded from the 1983 CFC it will lose this fertile source of financial contributions, approximately half a million dollars in recent years. Moreover, some federal employees will be deprived of the opportunity to donate to the organization of their choice. For a more complete discussion of the extent of the harm to plaintiff if excluded, *see* Orders, July 15, and July 26, 1983.

2. Plaintiff has made a strong showing that is likely to succeed on the merits. Defendant maintains that the "dispositive" reason for the exclusion from the 1983 CFC was that plaintiff did not comply with prescribed accounting practices—the "Standards". However, several other organizations similarly failed to follow exactly those same standards, and nonetheless were *approved* for the CFC program. In his final denial, defendant concedes that "given the complexity of the CFC program, and the limited resources with which it is conducted, it is not inconceivable that inconsistent applications of the regulations may occur." While the Court cannot finalize, without further evidence, the question of compliance with accounting practices or some irregularity, it cannot be ignored that plaintiff has participated for 15 immediate past years in the CFC and that its audit has been completed through examination by a nationally reputable certified public accountant, according to elsewhere accepted guidelines. In light of the differential treatment, the extraordinary and inexplicable delays in the consideration of plaintiff's application, the overall tone of the continuous inquiries, the controversial nature of plaintiff's activities, and defendant's admitted bias against

those activities, the Court must conclude that defendant's proffered grounds for denial are merely pretextual, and directly counter this Court's 1983 Orders, both July 15 and 26.

3. The harm to plaintiff in denying the requested relief overwhelmingly outweighs the harm to defendant in granting it. Exclusion of plaintiff at this stage would be irrevocable. Yet, should the Court subsequently determine that exclusion is indeed warranted, the local committees could simply strike plaintiff from the list of participants.

4. The public interest would be served by the issuance of an order directing plaintiff's inclusion. Federal employees have been invited to contribute to Planned Parenthood since 1968. In 1981 and again in 1982 they have had Dr. Devine's approval of their contributions. These employees certainly do not have to designate funds to Planned Parenthood, but they must be permitted independently to exercise free choice. The public would be otherwise gravely disserved. It is a matter of fairness and forthrightness.

Accordingly, to enable the parties to fully marshal and articulate their arguments in open court with supporting testimony, as appropriate, plaintiff's motion for a permanent injunction will be heard on September 26, 1983, at 1:30 p.m. at the expiration of the temporary restraining order hereby issued—the outside date designated by Dr. Devine for plaintiff to appeal his decision. Supporting papers from either side for the hearing on September 26 must be filed no later than 4:00 p.m., September 22, 1983.

It is ORDERED

that defendant, Donald J. Devine, his employees, agents and any others acting under his direction, be and they hereby are directed to immediately and unequivocally include Planned Parenthood Federation of America, Inc., as a national voluntary agency for participation in the 1983 CFC. This exact Order must be communicated to all local committees across the nation within 24 hours from its issuance to permit plaintiff's

inclusion in the lists to be finalized Monday, September 19, 1983.

Plaintiff, Planned Parenthood Federation of America, Inc., shall post a bond, cash or surety, in the sum of $100.00 no later than 4:00 p.m., Friday, September 16, 1983.

This Temporary Restraining Order has been issued at 5:59 p.m., September 15, 1983, and will expire at 5:59 p.m., on September 26, 1983, unless earlier extended or until further Order of this Court.

/s/ JOYCE HENS GREEN
Joyce Hens Green
United States District Judge

September 15, 1983